SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - October 05, 2011

EVENT DATE: 10/06/2011 EVENT TIME: 10:00:00 AM DEPT.: C-71

JUDICIAL OFFICER:

CASE NO.: 37-2011-00084611-CU-WM-CTL

CASE TITLE: UNITED ANGLERS OF SOUTHERN CALIFORNIA VS. CALIFORNIA FISH AND GAME COMMISSION

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED: Motion - Other, 08/19/2011

The Court rules on petitioner/plaintiff Coastside Fishing Club's ("Petitioner") amended petition for writ of mandate and complaint for declaratory and injunctive relief as follows:

Petitioner's Request for Judicial Notice. Petitioner's request for judicial notice is granted. Although, as a general matter, a court may only rely on the rulemaking file created by Respondent pursuant to Government Code section 11347.3 under the Administrative Procedures Act ("APA"), Government Code section 11350 subd. (d)(3) provides that, in addition to the rulemaking file, a court may consider "[a]n item that is required to be included in the rulemaking file but is not included in the rulemaking file, for the sole purpose of proving its omission." Similarly, although review brought under Code of Civil Procedure section 1085 is generally limited to a review of the administrative record of the agency (*Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 570 (hereafter "*Western States*")), the court in *Western States* also stated that extra-record evidence is admissible in traditional mandate cases to prove procedural unfairness and agency misconduct. (*Id.* at p. 575.) It is also admissible if relevant to "affirmative defenses such as laches, estoppel and res judicata." (*Ibid.*)

Respondent California Fish & Game Commission's ("Respondent") Evidentiary Objections. The Court rules as follows:

Cooke Declaration. The objection to the Cooke Declaration in its entirety is overruled.

Petitioner's Exhibits. The objections to the exhibits lodged with the moving papers is overruled for the reasons set forth above. Thus, the request to strike portions of the moving papers referencing said documents is also overruled.

Supp. Cooke Declaration and Attached Exhibits. The objections to the Supplemental Cooke Declaration in its entirety and Exhibit 4 are overruled. However, the objections to Exhibits 1, 2, and 5 are sustained on the ground of relevance.

Petitioner seeks a writ of mandate pursuant to Code of Civil Procedure section 1085 ("section 1085"), directing Respondent to vacate and set aside its adoption on August 5, 2009 of new or modified Marine Protected Areas ("MPAs") in state waters of the Pacific Ocean in an area known as the "North Central Coast study region" and its adoption of implementing regulations ("NCC Regulations"). It also asks the Court to declare the NCC Regulations invalid pursuant to Government Code section 11350.

More specifically, Petitioner (1) seeks to set aside the NCC Regulations on the ground that the Respondent lacked the statutory authority to adopt them (Third Cause of Action), 2) a declaration under Government Code section 11350 and Code of Civil Procedure section 1060 that Respondent lacked statutory authority to adopt the NCC Regulations and that the regulations are therefore void and invalid (Fourth Cause of Action), and (3) a declaration that Respondent failed to obtain a coastal development permit prior to adopting the NCC Regulations in violation of the California Coastal Act, Public Resources Code sections 30000 et seq. and that the regulations are invalid for this independent reason (Fifth Cause of Action).

Standard of Review. An administrative agency's adoption of regulations intended to govern future decisions is a quasi-legislative action reviewable by an action for declaratory relief or for traditional mandamus. (*Pacific Legal Found. v. Cal. Coastal Comm.* (1982) 33 Cal.3d 158, 168-169.) Government Code section 11342.2, which is part of the APA, states that 'no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute. (*Communities for a Better Environ. v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 108 (hereafter "*CBE"*).) Petitioner contends that this action involves the consistency prong.

Under either traditional mandamus or an action for declaratory relief, the court independently reviews the administrative regulation for consistency with controlling law. (*CBE, supra,* 103 Cal.App.4th at p. 108; *see also Watkins v. County of Alameda* (2009) 177 Cal.App.4th 320, 335.) "[T]he question is whether the regulation is within the scope of the authority conferred; if it is not, it is void." (*Id.* at pp. 108-109; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11 fn. 4 (hereafter "*Yamaha*").) However, the scope of review is narrow: If satisfied that the rule in question lay within the lawmaking authority delegated by the legislature, and this is reasonably necessary to implement the purposes of the statute, judicial review is at an end. (*Yamaha, supra,* 19 Cal.4th at pp. 10-11.) A court's function is to inquire into the regulations' legality, not its wisdom. (*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1040.) Abuse of discretion must appear very clearly before courts will interfere. (*Taylor v. Los Angeles* (1997) 60 Cal.App.4th 611, 618.) The absence of any specific statutory provisions regarding the regulation does not mean that such a regulation exceeds statutory authority. The agency is authorized to "fill up the details" of the statutory scheme." (*Marshall v. McMahon* (1993) 17 Cal.App.4th 1841, 1848.)

Construction of a statute by officials charged with administering it, including their interpretation of the authority vested in them to implement and carry out its provisions, is entitled to great weight. (*Morris v. Williams* (1967) 67 Cal.2d 733, 748 (hereafter "*Morris*").) The standard governing the court's resolution of the issue is one of "respectful nondeference." (*Mineral Assns. Coalition v. State Mining and Geology Bd.* (2006) 138 Cal.App.4th 574, 583.) The burden is on the party challenging a regulation to show its invalidity. (*Id.* at p. 589.)

As to the traditional mandamus portion of the action, judicial review of quasi-legislative action under section 1085 is generally limited to the record of proceedings before the administrative agency. (*Western States, supra,* 9 Cal.4th at p. 573.) In a challenge to quasi-legislative actions, a court may consider extra-record evidence relevant to procedural unfairness and agency misconduct. (*Id.* at p. 575.) Petitioner contends that this case is about agency misconduct i.e., Respondent acted without statutory authority.

As to the declaratory relief portion of the action, a court may consider the following evidence: (1) the rulemaking file prepared under Government Code section 11347.3, (2) the written statement prepared pursuant to Government Code section 11346.1 subd. (b), concerning an emergency, (3) an item that is required to be included in the rulemaking file but is not included in the rulemaking file, for the sole purpose of proving its omission, and (4) any evidence relevant to whether a regulation used by an agency is required to be adopted under this chapter. (Gov. Code §11350(d).)

Based on the briefs submitted by the parties, the Court has been asked to determine the following two procedural issues and two substantive issues.

The first issue is whether Petitioner failed to exhaust its administrative remedies.

Respondent contends that the Court lacks jurisdiction to hear the issues because Petitioner has failed to exhaust its administrative remedies by bringing such arguments to Respondent's attention during the 14-month rulemaking process, and deprived Respondent from the ability to cure any alleged procedural deficiencies if necessary.

The exhaustion of administrative remedies is a jurisdictional prerequisite to seeking judicial relief. (*Abelleira v. Dist. of Ct. of Appeal* (1941) 17 Cal.2d 280, 292.) The failure to exhaust is a jurisdictional defect. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197.) It is based upon the notion that a public agency must be given an opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review. (*Id.* at p. 1198.) Even claims of constitutional infirmities (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 276) and challenges to the validity of any governing regulation (*Woods v. Super. Ct.* (1981) 28 Cal.3d 668, 680) must be presented in the first instance to the administrative agency. This requirement permits the agency to apply its expertise, resolve factual issues, apply statutorily delegated remedies, and mitigate damages. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 86.)

However, the doctrine does not apply where no specific administrative remedies are available to the plaintiff. (*City of Coachella v. Riverside County Airport Land Use Comm.* (1989) 210 Cal.App.3d 1277, 1287 (hereafter "*City of Coachella*").) None of the statutes cited by Respondent as authority to adopt the NCC Regulations provides an administrative remedy. Although the Coastal Act authorizes administrative appeals to challenge actions on a permit application, Public Resources Code section 30602 et seq., no such review is provided where, as here, a permit is never sought. Although the APA provides for public hearings and participation (Gov. Code §§11346.8, 11346.45) and authorizes petitions for or against adoption of a regulation (*Id.* at §§11340.6, 11340.7), no exhaustion requirement arises. Similarly, under Government Code section 11350, the basis for declaratory relief in this case, "[t]he right to judicial determination shall not be affected by the failure either to petition or to seek reconsideration of a petition filed pursuant to Section 11340.7 before the agency promulgating the regulation or order of appeal." (Gov. Code §11350(a); *see also Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 320.) "There must be 'clearly defined machinery' for the submission, evaluation and resolution of complaints by aggrieved parties." (*Jacobs v. State Bd. of Optometry* (1978) 81 Cal.App.3d 1022, 1029.)

The second issue is whether Petitioner's claims are barred by the doctrines of estoppel, waiver, and/or laches.

Respondent alternatively argues that Petitioner's advocacy for one of the proposed MPA alternatives presented to Respondent resulted in estoppel of its present claims under principles of laches and waiver. More specifically, Respondent contends that Petitioner never gave notice to Respondent that it believed Coordinating Committee review was required or that a coastal act permit was needed and validated the process by urging that Respondent exercise its statutory authority to adopt one of the alternative MPA options by advocating and supporting one the of alternatives presented to Respondent. (NCCAR 001948-49; 003005-07, 003478-79, 003482-85, 004222-24, 00427778 (oral testimony); NCCAR 002124-26, 004027-47 (response to comments), 031626, 031782-83, 031784-86, 31789-91, 31799-80131806, 34962-94, 34766, 34773, 35625 (written testimony).)

Although "[a] person may waive the advantage of a law intended for his or her benefit... 'a law established for a public benefit cannot be waived or circumvented by a private act or agreement.'" (*Bickel v. Piedmont* (1997) 16 Cal.4th 1040, 1051l) The provisions of the Marine Life Protection Act ("MLPA"-Fish & Game Code section 2850 et seq.), the Marine Managed Areas Improvement Act ("MMAIA"), and the Coastal Act are expressly for public benefit, as are laws limiting an agency's regulatory authority to that delegated by the Legislature, and requiring it to strictly follow procedures directed by the Legislature." (*See* Gov. Code §§11342.1, 11342.2; *Whitcomb Hotel, Inc. v. Cal. Employment Comm.* (1944) 24 Cal.2d 753, 759.) Furthermore, "[w]aiver is the intentional relinquishment

of a known right after full knowledge of the facts." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 59.) Here, there is no evidence that Petitioner knew or could have known of Respondent's alleged procedural failures. (Cooke Dec., ¶¶10-11, 13.)

As to Respondent's contention that Petitioner's comments at public hearings supporting one of the MPA alternatives validated the process and preclude it from attacking it now on this basis, Petitioner's objections raised during the rulemaking process and its unsuccessful support for one of the MPA alternatives are not irreconcilable with its right to enforce Respondent's compliance with mandatory procedural requirements applicable to whatever alternative Respondent adopted.

Finally, the equitable doctrine of laches requires "unreasonable delay in bringing suit" plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*City of Coachella, supra,* 210 Cal.App.3d at p. 1286.) Here, Petitioner never acquiesced and Respondent suffered no prejudice. In any event, this action was filed 9 months after the NCC Regulations became effective. Laches cannot be used to shorten a limitations period mandated by the Legislature and is unavailable as a defense when a lawsuit is filed within the limitations period, which, for this writ of mandate, is 3 years. (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424*,* 439.)

The third issue is whether Respondent exceeded the scope of its authority in approving the NCC Regulations.

Petitioner's arguments regarding Fish and Game Code sections 200, 202, 203.1, 205(c), 219, 220, 2860, and 6750 are irrelevant because Respondent did not rely on these statutes to designate the NCC MPAs. Instead, Respondent referenced Fish and Game Code section 2861 subd. (c) ("section 2861"), which states that it is entitled to rely on "existing authority" for designation authority that is contained in Fish and Game Code section 1590 and Public Resources Code section 36725 before the completion of the MLPA master planning process for the entire state. the MLPA does not preclude designation of MPAs before the adoption of a final master plan. Section 2861 subd. (c) expressly permits Respondent to designate new MPAs prior to a final Master Plan. Furthermore, the fact that Fish and Game Code section 2859 subd. (b) ("section 2859") contemplates that additional regulations will be adopted after adoption of the final Master Plan does not mean that Respondent is barred from adopting other regulations before the adoption of the final Master Plan, especially since section 2859 subd. (c) expressly confers authority to designate MPAs before the conclusion of the master plan process. Notably, the court in *Coastside Fishing Club. v. Cal. Resources Agency* (2008) 158 Cal.App.4th 1183, 1194 already sanctioned a regional and phased approach to MPA planning.

In addition, review by the Coordinating Committee is not applicable to MPA proposals submitted by managing or designating entities.

One, the designation authority contained in section 1590 is not subject to the Coordinating Committee review process contained in the MMAIA because it exists as a stand-alone statute that is outside the MMAIA.

Two, Coordinating Committee review is also not required because Respondent's rulemaking process involving MPA designations only applies to external MMA proposals from individuals and organizations, not managing and designating entities. (Pub. Resources Code §§36800, 36900.) Notably, section 36900 distinguishes between individuals and organizations and managing and designating entities. A managing entity includes the Department and defines designating entity to include Respondent. (Pub. Resources Code §36602(b), (c).) Here, Petitioner admits the BRTF was convened as an advisory body to the Department and Resources Agency and thus was vested with quasi-state entity status. (Moving Papers, p. 21.) Respondent concluded that the MMAIA does not require review by the Coordinating Committee where the MPA proposals were crafted through a process overseen by a "managing entity." Respondent's interpretation of the statute is entitled to great weight. (*Morris, supra,* 67 Cal.2d at p. 748.)

The fourth issue is whether Respondent was required to obtain a coastal development permit.

Petitioner contends that Respondent failed to obtain a coastal development permit, citing Public Resources Code sections 30600 subd. (a), 30103 subd. (a), and 20106. (Cooke Dec., ¶13.) It also states that the MMAIA specifically provides that the process for designating MMAs "does not replace the need to obtain the appropriate permits or reviews of other government agencies with jurisdiction or permitting authority." (Pub. Resources Code §36900(d).) Furthermore, none of the types of developments and areas exempt from coastal development permit requirements apply to the NCC Regulations.

However, the designation of MPAs falls within an exemption in the Coastal Act for "establishment and control of wildlife and fishery programs." (Pub. Resources Code §30411(a).) Under this statute, the Coastal Commission is statutorily obligated to defer to Respondent where the MPA is concerned. Living marine resources fall within the definition of wildlife. Thus, no permit was required by statute. Finally, adoption of the MPAs did not constitute "development" as reasonably interpreted to require a permit and even if it did, it was not within the purview of the Coastal Commission's control. (Pub. Resources Code §§30600, 30411.)

Based on the foregoing, the petition is denied.

IT IS SO ORDERED.